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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 807

UNITED AIRCRAFT CORPORATION, PRATT & WHITNEY AIRCRAFT DIVISION, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 2a–8a) is reported at 324 F. 2d 128. The Board's decision and order (J.A. 1–23)[1] are reported at 139 N.L.R.B. 39.

JURISDICTION

The decree of the court of appeals was entered on December 2, 1963 (Pet. 9a). The petition for a writ of certiorari was filed on February 3, 1963. The ju-

[1] References designated "J.A." are to the decision and order of the National Labor Relations Board and to portions of the testimony and exhibits printed as a joint appendix in the court of appeals.

risdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it is an unfair labor practice, regardless of the availability of other means of distribution, for an employer to ban the distribution of union literature on company property (such as the area between the parking lot and the work buildings) during the employees' own free time.

2. Whether substantial evidence supports the Board's finding that the literature banned by the employer did not disrupt discipline or production.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. 151, *et seq.*) are set forth at page 1a of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

Petitioner is a manufacturer of aircraft engines and parts. Since 1953, it has had a contract with UAW [2] Local 1234, the certified bargaining representative of production and maintenance employees at its North Haven plant (J.A. 7; 80–81). In September 1959, about half of the approximately 3500 employees in the unit were members of the Union, but between then and May 1960 the unit increased to 4100 or 4200 employees (J.A. 7, 9; 80–82). The collective agreement had no union security provision (J.A. 96; 102).

[2] International Union, United Automobile, Aircraft, and Agricultural Implement Workers, AFL–CIO.

Prior to 1956, the Union distributed literature to petitioner's employees off Company premises, generally at the base of a ramp connecting the Company parking lots with the public highway (J.A. 7; 156). In 1956, the Company gave the Union permission to distribute literature at two tunnel entrances to the plant through which employees customarily walked to work after parking their cars on the adjacent Company parking lots (J.A. 7; 156). Thereafter, and until petitioner promulgated its no-distribution rule on September 16, 1959, employees distributed union literature to fellow employees before they reported to work,[a] by standing in the parking lots about 10 feet from the entrances to the tunnels leading to the plant (J.A. 7–8; 82–85).

In May 1959, while the Local was being administered by Greenberg on behalf of the International Union, the Union distributed two leaflets which, *inter alia,* characterized petitioner's officials as "Fascists," "Communists" and "Storm Troopers" (J.A. 8; 66, 67–69, 88). Greenberg was replaced in June 1959, when employee Warren Chamberlain was elected president of the Local (J.A. 8; 80, 88). Thereafter, Wilfred Hall, petitioner's North Haven plant personnel manager, called Chamberlain to his office to discuss any problems Chamberlain or the Union "felt they might have" (J.A. 8; 149, 152). Hall protested against leaflets like those Greenberg had distributed,

[a] The Union did not attempt to distribute literature to employees as they left work because "they are rushing for their cars pell mell"; employees came to work much more leisurely (J.A. 109).

complaining that they had vilified Company officials with unfounded accusations (J.A. 8; 153), and urged the Union to discuss complaints with management before airing them in its leaflets (J.A. 8; 90, 164). Chamberlain told Hall that the Union was dissatisfied with certain cafeteria conditions,[4] and complained about the delay which employees encountered upon leaving the parking lots at the close of their shift, and about poor ventilation in the plant (J.A. 8–9; 90–91, 116). As a result of this conversation, Chamberlain "understood" that Hall was going to look into these conditions, but never heard anything more about them (J.A. 91).

From June 23 to September 16, 1959, Chamberlain prepared a series of six leaflets which employees distributed at the tunnel entrances to petitioner's plant (J.A. 9; 91, 92). These leaflets (J.A. 28–42) criticized food quality, high prices, and unclean trays in the cafeteria; voiced unremedied complaints about plant ventilation, slow-moving traffic at the end of the shifts, and other working conditions; announced termination of the International's control over the Local's affairs; urged members to vote in coming union elections; objected to a Company official's personal attack upon the Union president during a grievance proceeding; and appealed to nonmembers to join the Union so that they might "pay their way" and help the Union secure an increase in membership, essential to victory in its fight for a better contract (J.A. 9; 91–92,

[4] Chamberlain testified that he complained about the "greasy French fried potatoes" and "trays not being cleaned" (J.A. 90, 91).

113–114). The Union also issued three other leaflets, not prepared by Chamberlain, during this period. These (J.A. 48–55) announced the pending end of the International's administration of the Local; urged the selection of competent stewards and committeemen; announced a forthcoming grievance meeting with petitioner; criticized petitioner's vice president for not meeting to discuss employee vacation schedules; and complained that an employee's improvement suggestion had gone unrewarded. None of the leaflets distributed after June 1959, characterized Company officials in terms like those used in the earlier leaflets, to which petitioner had objected (J.A. 9; 163).

At a meeting with the Union on July 10, 1959, Personnel Manager Morse criticized the leaflets, singling out the objectionable matter in the earlier Greenberg leaflets (J.A. 10; 160, 161, 166). Morse reminded the Union that distributing literature on Company property was a privilege, not a right, and that this privilege could be lost (J.A. 10; 160). At another grievance meeting held about the beginning of September 1959, Assistant Personnel Manager Corper criticized Chamberlain for telling petitioner how to run its cafeterias and warned him that the cafeterias were operated for the convenience of the employees and might be discontinued (J.A. 10; 89).

Around the first of September 1959, many of the employees on the 11 and 11:15 a.m. eating shift boycotted one of the cafeterias by bringing their own lunches (J.A. 10; 150–151). Some booed those who approached the food line (J.A. 10; 151), but petitioner did not complain to Chamberlain about the situation

(J.A. 10; 134, 160) although the booing incidents continued for about two weeks. The incidents promptly stopped when petitioner warned the employees that, if such conduct continued, they might be disciplined or forbidden to use the cafeteria (J.A. 10; 151–152, 158–159). The protest was not organized by the Union (J.A. 119).

On September 16, 1959, Hall called Chamberlain into his office and told him that, since the Union had abused the privilege of distributing literature on Company property, petitioner was withdrawing it (J.A. 11; 86, 96, 155). Hall referred to "the litter problem which had been discussed with Chamberlain's predecessors,"[5] and to an incident in December 1958, when Celentano, a former Union president, allegedly spoke improperly to an employee while handing out leaflets and was permanently barred from distributing them as a result (J.A. 11; 87). Hall objected to leaflets "designed to incite employees and to tell them what a lousy place Pratt Whitney was to work," and to the Union's use of the Company's "front porch, so to speak for such a purpose" (J.A. 11; 86–87, 155). Hall insisted that "Chamberlain's predecessor * * * had written these things and no matter how subtly Chamberlain might have attempted to write his flyers, I could see no appreciable difference" (J.A. 11; 155). Finally, Hall warned that "anyone who attempted to

[5] Hall testified at the hearing that leaflets littered the tunnel area on days when flyers were distributed (J.A. 157), but the Company had never previously complained about this problem to Chamberlain (J.A. 11; 86).

hand out flyers on company property would be escorted off the property" (J.A. 87, 156).

Since the promulgation of the rule against distribution on Company property, employees have been distributing union literature on a public highway at the foot of a ramp leading to the parking lots, handing flyers to employees as they drove to work (J.A. 11; 89, 97).[6]

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board found that petitioner's ban was prompted by the content of the leaflets distributed *after* Chamberlain took office and not by the littering problem or the 1958 Celentano incident (J.A. 11, 15). It further found that the post-Chamberlain leaflets were designed to improve working conditions and union organization, matters of vital interest to the employees; that the relevant, sharp criticism contained in those leaflets was neither malicious nor "deliberately untrue";[7] and that the leaflets neither advocated nor contributed to the spontaneous cafeteria demonstrations (J.A. 11, 15–16, 17). Moreover, the Board

[6] In light of its view of the law, the Board made no findings concerning the adequacy of this method of distribution (J.A. 18). The record shows, however, that distributors must stand between lines of cars on sloped footing which is slippery when wet, that there have been a number of near accidents, and that a car mirror struck one employee distributing leaflets (J.A. 97–99).

[7] The epithets "Communist," "Fascist," and "Storm Trooper" were not repeated in the leaflets distributed by Chamberlain (J.A. 16), and the earlier leaflets were not considered by the Board in reaching its decision (J.A. 2, n. 1).

found that, even if the leaflets had contributed to the demonstrations, petitioner's no-distribution rule was not needed to maintain production or discipline, for threats of disciplinary action had proved sufficient to curb the booing incidents (J.A. 17).

On these facts, the Board concluded that petitioner violated Section 8(a)(1) of the Act by prohibiting employees from distributing union literature on nonworking time in nonworking areas of the plant (J.A. 2, 15). The Board declined to consider the availability of other means of distribution, holding that other means would not excuse the prohibition where, as here, the rights of employees, as distinguished from nonemployees, were involved (J.A. 17–18). The Board's order requires petitioner to rescind its ban on distribution during nonworking time, and to cease and desist from in "any like or related manner" interfering with its employees' right to self-organization (J.A. 2–3). The order also requires petitioner to notify the Local and the International that the nondistribution order is rescinded and to post appropriate notices (J.A. 3–4).

C. THE COURT OF APPEALS' DECISION

The court of appeals held that the record sustained the Board's findings of fact that the leaflets were not improper and did not disrupt production or discipline (Pet. 3a). It also held that the Board did not err in failing to consider the availability of alternative means of communication (Pet. 4a–8a). Accordingly, the court enforced the Board's order in full (Pet. 8).

ARGUMENT

1. The court of appeals correctly rejected petitioner's argument that the Board should weigh the alternative means of communication available to employees in this particular case in testing the validity of the employer's no-distribution ruling. The inquiry was irrelevant because a rule barring employees from distributing union literature on company property such as a parking lot during their own free time is an interference with rights guaranteed by Section 7 regardless of the availability of other means of distribution. The point was settled almost 20 years ago in *Republic Aviation Corp.* v. *National Labor Relations Board* (the *Le Tourneau* case), 324 U.S. 793,[*] where the Court considered and expressly rejected petitioner's contention. In *Le Tourneau*, as here, the employer banned the distribution by employees of union literature in a company parking lot during non-working time. The company argued that the Board could not find that the ban was an unfair labor practice unless there was evidence showing that the rule "interfered with and discouraged union organization in the circumstances and situation of each company" (324 U.S. at 798). The Court noted that there was no "evidence or a finding that the plant's physical location made solicitation away from company property ineffective to reach prospective union members" (pp. 798–799), but never-

[*] The Court's opinion covered two cases, *Republic Aviation* and *National Labor Relations Board* v. *Le Tourneau Co. Republic Aviation* involved a rule against solicitation of union membership, whereas *Le Tourneau* involved a rule against distribution of union literature.

theless held that the ban on the distribution of union literature by employees on their own time violated the Act. The circumstances were indistinguishable from those of the present case.

In the *Republic* and *Le Tourneau* cases the Court expressly approved the Board's handling of these problems under the principles established by *Peyton Packing Co.*, 49 N.L.R.B. 828, where the Board, calling upon its expert knowledge of industrial conditions, determined that rules barring union solicitation by employees on company property outside of working hours would be presumed undue impediments to self-organization in the absence of evidence that extraordinary circumstances prevailing in the particular plant made the rule necessary to maintain production or discipline.[9] While this approach allows the employer to prove some special need that justifies the rule, the *Peyton Packing* presumption, as applied and approved by this Court in *Le Tourneau*, allows no exceptions based upon the claim that the union could engage in solicitation or distribute union literature elsewhere. The other avenues of distribution were considered then, and the balance was struck in favor of freedom of communication regardless of how favorable the alternatives might be. The court below restated the reason effectively in the present case (Pet. 5a): "In a plant the entire work force may be contacted by a relatively

[9] It was to adduce evidence relating to a possible disruption of production or discipline, and not evidence relating to alternative means of communication (see Pet. 15), that the Court thought a motion for leave to adduce additional evidence in the court of appeals or before the Board might have been granted. 324 U.S. at 804.

small number of employees with little expense. The solicitors have the opportunity for personal confrontation, so that they can present their message with maximum persuasiveness. In contrast, the predictable alternatives bear without exception the flaws of greater expense and effort, and a lower degree of effectiveness."

No subsequent decision qualifies or casts doubt upon the clear holding of *Republic* and *Le Tourneau*. *National Labor Relations Board* v. *Babcock & Wilcox Co.*, 351 U.S. 105, dealt with distribution by non-employees and reaffirmed the ruling in *Republic* that—

> No restriction may be placed on the employees' right to discuss self-organization among themselves unless the employer can demonstrate that a restriction is necessary to maintain production or discipline. * * * [351 U.S. at 113.]

National Labor Relations Board v. *United Steelworkers of America*, 357 U.S. 357, dealt only with the narrow question whether an employer who has adopted a no-solicitation rule, under circumstances in which it is conceded to be valid,[10] commits an unfair labor practice by enforcing the rule against employees while he

[10] In *Nutone*, the first of the cases covered by the Court's opinion in *Steelworkers*, the employer's broad no-distribution rule was invalid on its face, but the General Counsel neither alleged its invalidity in the complaint nor excepted to the Trial Examiner's finding that it was valid. *Nutone, Inc.*, 112 NLRB 1153, 1154, n. 2. See also *United Steelworkers* v. *National Labor Relations Board*, 243 F. 2d 593, 596 (C.A.D.C.). In the companion case, *Avondale Mills*, the employer prohibited union solicitation only during working hours. See *National Labor Relations Board* v. *Avondale Mills*, 242 F. 2d 669, 670–671 (C.A. 5).

himself engages in anti-union solicitation. It was only in this limited context, where the question was whether the employer had created a condition in which he and the union had unequal opportunities for communication, that the Court indicated that the Board should consider the alternative avenues available to the union."

The rule established by *Republic* and *Le Tourneau* has been followed by the Board and in the courts of appeals with virtually unbroken uniformity."

National Labor Relations Board v. *Rockwell Manufacturing Co.*, 271 F. 2d 109, may indicate a departure in the Third Circuit, but we doubt that it represents

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[11] The dictum in *Steelworkers* upon which petitioner relies (Pet. 17) cannot fairly be read as a *sub silentio* overruling of *Republic Aviation*. The viability of that decision was not challenged by any party in *Steelworkers*. See Brief for the Respondent in No. 289, October Term, 1957, pp. 21, 37; Brief for Respondent in No. 81, October Term, 1957, pp. 20–24; Brief for the National Labor Relations Board in No. 81, October Term, 1957, pp. 4, n. 3, 19–20, n. 5, 22.

[12] See, for example, *Olin Industries, Inc.* v. *National Labor Relations Board*, 191 F. 2d 613, 616–617 (C.A. 5), certiorari denied, 343 U.S. 919, enforcing 86 N.L.R.B. 203; *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 813–814 (C.A. 7), enforcing 61 N.L.R.B. 1129; *National Labor Relations Board* v. *La Salle Steel Co.*, 178 F. 2d 829, 833–834 (C.A. 7), certiorari denied, 339 U.S. 963, enforcing 72 N.L.R.B. 411; *Time-O-Matic, Inc.* v. *National Labor Relations Board*, 264 F. 2d 96, 100–101 (C.A. 7), enforcing 121 N.L.R.B. 179; *National Labor Relations Board* v. *Caldwell Furniture Co.*, 199 F. 2d 267 (C.A. 4), certiorari denied, 345 U.S. 907, enforcing 97 N.L.R.B. 1501; *National Labor Relations Board* v. *Monarch Tool Co.*, 210 F. 2d 183, 186–187 (C.A. 6), certiorari denied, 347 U.S. 967, enforcing 102 N.L.R.B. 1242. See, also, *Stoddard-Quirk Manufacturing Co.*, 138 N.L.R.B. 615.

any real difference of opinion or uncertainty concerning the continued vitality of the long-standing principle. Since the *Rockwell* decision over four years ago, the Fifth Circuit has twice applied the *Le Tourneau* principle in accordance with the decision below. *National Labor Relations Board* v. *Walton Mfg. Co.*, 289 F 2d 177, 180–181; *National Labor Relations Board* v. *Texas Aluminum Co.*, 300 F. 2d 315, rehearing denied, 303 F. 2d 435;[14] see also *Time-O-Matic, Inc.* v. *National Labor Relations Board*, 264 F. 2d 96, 100–101 (C.A. 7). Despite some of the language *Rockwell* is probably to be explained upon special grounds not in true conflict with the decision below: that the employer's no-distribution rule was promulgated six years before the dispute, "was premised on its desire to 'serve production, order and discipline'" and the company "enforced its no-distribution rule to maintain order" (271 R. 2d at 116). In the present case, on the other hand, petitioner did not succeed in justifying its rule upon that ground (Pet. 3a; J.A. 17). Accordingly, the Third Circuit may reasonably be expected to adhere to the otherwise uniform current of authority when the issue is squarely presented.

2. Petitioner's other contentions (Pet. 18–20) relate to "special circumstances" allegedly justifying its no-distribution rule. Each of these contentions, in effect, asks this Court to reverse Board findings of fact based upon substantial evidence and affirmed by the

[14] See also *National Labor Relations Board* v. *Great Atlantic & Pacific Tea Co.*, 277 F. 2d 759, 762–763 (C.A. 5).

court of appeals. There is no basis for further review of these factual issues. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491. Thus, petitioner says the ban was limited to literature telling employees the Company was "a lousy place to work" and disrupting discipline. The Board found upon the basis of undisputed testimony—including that of petitioner's own witness—that the prohibition was general (J.A. 11; 86, 96, 155, 342–343). Moreover, petitioner's contention that the Board's order requires it to permit the distribution of union literature which is disruptive of production and discipline rests on the premise that the leaflets in fact caused a litter problem and the cafeteria disturbances. But, as to the litter problem, petitioner admitted in its brief to the Trial Examiner that its ban was "brought about solely because of the contents of the literature" (Br. p. 10), and the Board found upon substantial evidence that the littering claim was an afterthought (J.A. 11, n. 7; 86). And, as to whether the leaflets caused the cafeteria demonstrations, the Board found upon substantial evidence that they did not, and that "it was just as reasonable to infer that the employees engaged in such conduct on their own" (J.A. 17; 40).[11]

[11] Although Union leaflets criticized cafeteria conditions before and during the two-week demonstration period (J.A. 36, 38, 40–41), petitioner never asked Union Representative Chamberlain to discontinue the criticisms (J.A. 10; 134–135, 160).

CONCLUSION

For the above stated reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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